Joint Academic Opinion
Re: Copyright Amendment Bill (B-13B of 2017)

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May 10, 2021

We offer the enclosed Joint Opinion on the President's referral of the Copyright Amendment Bill back to Parliament. We address the President's reservations about the Bill's constitutionality, as well his expressed concerns about the Bill's domestic application of international law. We analyse each of, and only, the specific clauses in the CAB that are mentioned in the President's letter. The question we ask and answer is whether Parliament should take action to bolster the constitutionality of any of the provisions identified in the President's letter.

To prepare this Opinion, we reviewed the Copyright Act, the President's letter, the 2019 Copyright Amendment Bill (B-13B of 2017) ("CAB"), and the analysis of the

Panel of Experts appointed to Parliament to review the Bill.[1]

We conclude that the CAB could be interpreted and implemented in a constitutional manner, including with regulatory clarifications. But we recommend that Parliament aid the process of constitutionally implementing the proposed law through the following specific technical changes to the Bill, language for which is included in the Appendix:

- Revise Sections 7A and 8A to require only a "fair" royalty in each;
- Require that quotations under Section 12B(1)(a) be "consistent with fair practice", as in the current Act;
- Remove the exception in Section 12B(1)(e)(i) for uses of works not subject to reservations of rights;
- Revise the translation right in Section 12B(1)(f) to include the full range of purposes for which a lawful translation may be made;
- Add a clarification to Section 19D that it authorizes cross-border trade by "authorized entities" as defined by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled.

I. Unconstitutionality of the Current Copyright Act of 1978

It is our opinion that the current apartheid-era Copyright Act of 1978 violates the Bill of Rights in several respects. Specifically, the 1978 Act:

- unfairly discriminates against persons living with visual and print disabilities as it does not permit the creation of accessible formats of works under copyright without permission from the rights holder, in violation of the right to equality, Sec. 9;
- does not permit uses of works to the degree required for freedom of expression, in violation of the right to receive and impart information, Sec. 16;
- inhibits access to educational materials in the modern world, including through the digital environment, in violation of the equal right to basic and further education for all, including in languages of the students' choice, Sec. 29;
- does not allow for materials to be translated into underserved languages, in violation of rights to use languages of one's choice and participate in

[1] In particular, we reviewed in detail the comments by Ms Michelle Woods of WIPO, Geneva, Switzerland ("Woods") and the opinion of counsel for the International Publishers Association, André Myburgh, of Lenz Caemmerer, Basel, Switzerland, http://legalbrief.co.za/media/filestore/2018/10/andre_myburgh.pdf ("Myburgh").

cultural life, Sec. 30 and 31;

- does not protect the rights of authors, performers, and other creators to fair remuneration and fair contract terms, as needed to promote the right to dignity and the principle of decent work, Sec. 10.

The CAB promotes the Constitution and the Bill of Rights by amending the deficient Copyright Act with provisions modelled on examples that exist in other open and democratic societies. Until the CAB is adopted, the Copyright Act 1978 will continue to violate the Bill of Rights, and therefore responding to the President's reservations and finalising the Copyright Amendment Bill is urgent. The urgency of amending the Copyright Act is all the more urgent with the advent of the COVID-19 pandemic, which has cut off access to physical schools, libraries and other institutions. These public services, in many cases, are not enabled to share materials for remote access and learning needed to promote the enjoyment of the rights in the Bill of Rights.

II. Tagging

We conclude that re-tagging the Bill is not constitutionally required, and would indeed be constitutionally suspect.

The Copyright Amendment Bill was passed by Parliament following the procedure set out in Section 75 of the Constitution. The Section 75 process is for "Ordinary Bills not affecting provinces." It is the process used for other copyright and intellectual property amendments. The President states that he has reservations that the Section 76 process should have been followed because copyright amendments affect areas like trade and culture, which are subject to joint national and provincial authority.

The President's reservations are, in our opinion, unfounded. The applicable portion of Section 76 of the Constitution describes a process requiring a greater provincial role in legislation only if it "falls within a functional area listed in Schedule 4." The regulation of copyright, and all intellectual property law, does not fall within a functional area listed in Schedule 4. At most, the impact on provincial competencies, such as culture and trade, are mere "knock on effects," rather than the "direct regulation" required to trigger the Section 76 process.[2] Re-tagging and following Section 76 would be contrary to the Constitution and would render the CAB open to subsequent constitutional challenge.

III. Royalty Rights In Existing Contracts

We conclude that the royalty rights provisions of the Bill should be amended to

[2] *Democratic Alliance v President of South Africa and Others* 2014 (4) SA 402 (WCC) para 94-95.

require only "fair" remuneration for current dispositions of copyrights.

The President states his reservation that the royalty requirements in the Bill may constitute "retrospective and arbitrary" regulation of property protected by the Constitution.

The alleged retrospectivity of the royalty provisions is not, in itself, a ground to find the provisions unconstitutional. Many laws, including all minimum wage laws, are "retrospective" in the limited sense of applying to future work under existing contractual or other arrangements. This is the same effect of the CAB's royalty provisions. The CAB applies its royalty requirements "where copyright in that work was assigned before the commencement date" of the Act, but only if the work "is still exploited for profit", and only for uses "after the commencement date" of the Act.[3] The CAB does not require that royalties be paid for past uses of works.

We accept that the royalty provisions must avoid arbitrariness to comply with the Constitution, despite the unclarity in South African constitutional law as to whether rights conveyed in copyright agreements are constitutionally protected property.[4] The provisions do not lack an adequate purpose. There was ample evidence before Parliament of unfairness in current and past contracts between South African creators and distributors of their work.[5] Other copyright laws have responded to similar problems by requiring adequate remuneration of authors and

[3] Copyright Amendment Bill, Sec. 6A(7).

[4] The question of whether copyright is covered by the right not to be arbitrarily deprived of property under section 25 has not been definitively settled in South African law. *See Laugh It Off Promotions CC v South African Breweries* [2005] ZACC 7) (deciding that free expression rights apply to use of parody in trademarks without deciding whether trademarks are property protected by section 25); *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation* [2019] ZACC 41 (characterising patents as a statutory system creating an 'artificial monopoly' rather than property for the purposes of section 25); *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26 at 75 (holding that there was no defect in the final Constitution on the basis that it did not contain an explicit right to intellectual property in the Bill of Rights). We do not need to opine here, however, on whether the regulation of contract implicates the right not to be deprived arbitrarily of *property* because all legislation must avoid arbitrariness. *See Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1.

[5] *See* Copyright Review Commission Report 2011 (surveying the plight of South African creators and recommending that unfair contracts be regulated, that excessive costs and unfair practices of collective management organizations be controlled, that copyrights revert to the creator after 25 years, and that the Copyright Tribunal be streamlined).

performers, including recently in the European Union.[6]

Any perceived constitutional problem may arise from the failure of sections 7A and 8A to explicitly limit the required royalty in existing agreements to "fair" remuneration.[7] Without clarifying regulations or interpretation, the law as written could be seen to require the renegotiation of otherwise fair copyright licenses and transfer agreements.[8] This could arguably be considered an arbitrary regulation, as there would be no legitimate reason to alter existing arrangements that are already fair. We therefore advise that the Bill revise sections 7A and 8A to clarify that existing arrangements are required to be modified only when their terms are not fair.

IV. Exceptions To Rights

We conclude that the limitations and exceptions to rights – considered individually and together – are reasonable, justifiable and indeed necessary, and reflect those contained in many open and democratic societies around the world. Nothing in international or comparative copyright law suggests that the number or collective effect of the exceptions is impermissible, excessive or extraordinary.[9] We

[6] Similar provisions were recently included in the European Union's 2019 Digital Single Market Directive. Specifically:

- Article 18 of the DSM Directive gives authors and performers a right to "appropriate and proportionate remuneration."
- Article 19 requires reporting of uses to enable remuneration determination - requiring that "authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due."
- Article 20 applies to existing contracts through what some refer to as a "bestseller" clause. The Articles provides a "contract adjustment mechanism" in which authors and performers are "entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights … when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances."

[7] Proposed section 6A would require that authors of literary and artistic works be entitled to "a fair share" of royalties for uses of their work. Sec 7A and 8A change the standard, proposing that authors of "visual artistic works" and performers in audiovisual works "share in the royalty received for" uses of their protected rights. The provisions apply to prospective uses of works created before the Act goes into effect.

[8] It could require the revision, for example, of an arrangement that provided a fully adequate payment to an author or performer through a lump sum payment, rather than through "a royalty".

[9] There are many countries that have more exceptions than South Africa would under the Bill. See e.g. Australia Copyright Act of 1968 Sections 103, 135A-ZT (providing four separate fair dealing exceptions and 38 provisions for other exceptions). See generally Standing Committee on Copyright and Related Rights, Thirty-Fifth Session, Geneva, November 13 to 17, 2017, Updated Study And Additional Analysis Of Study On Copyright Limitations And Exceptions For Educational Activities prepared by Professor Daniel Seng (surveying the common practice of countries around the world to enact multiple exceptions and limitations).

do, however, propose technical amendments that would dispel any doubts about the constitutionality of some of the provisions questioned by the President.

A. 12A, Fair Use

We conclude that there was adequate public participation in drafting the fair use clause in Sec. 12A, and that the fair use right is fully in compliance with the Constitution.

The fair use clause was adequately considered in public submissions and testimony. Parliament and the Department of Trade and Industry considered in many public processes that South African copyright law currently has a general exception permitting for a "fair dealing" with a work. Semantically, the terms "use" and "dealing" are equivalent.[10] A key difference from present law is the inclusion of the words "such as" before the list of permitted purposes - making clear that the list is open to other purposes of use, as long as the use itself is fair to the copyright owner. Similar openness to purposes is present in about a dozen other countries.[11] The policy reason to include an opening term like "such as" to a list of permitted purposes is to ensure that fair uses of the future – that cannot be known today – are permitted without further legislative amendment.[12] This policy issue was thoroughly canvassed in the parliamentary record. Indeed, the term "such as" was present in the 2015 Bill, removed in a later draft, and then reinserted based on consideration of comments from the public. This legislative history shows that the issue was adequately considered and commented on by the public.

Another difference from present law is that the inclusion of express factors to be considered in determining whether a use is fair. These factors, although new to the statute, substantially reflect South African case law and commentary.[13]

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[10] O H Dean, Handbook of South African Copyright Law (1987) 1-52 ("While it is true that the American Act refers to 'fair use' whereas the South African Act uses the term 'fair dealing' it is submitted that for the present purposes the two terms are synonymous").

[11] *See* Elkin-Koren, Niva and Netanel, Neil Weinstock, *Transplanting Fair Use Across the Globe: A Case Study Testing the Credibility of U.S. Opposition,* Joint PIJIP/TLS Research Paper Series #50, 3-6 (2020) (finding that "the fair use model has been adopted, with some variation, in a dozen countries").

[12] *See Supreme Court of Appeal in Golden China v Nintendo* Golden China TV Game Centre and Others v Nintendo Co Ltd (55/94) [1996] ZASCA 103; 1997 (1) SA 405 (SCA); [1996] 4 All SA 667 (A) (25 September 1996) at 13-14 (discussing the "intention" in the Copyright Act "to cover future technical innovations by using general words"; "This general scheme of the Act suggests to me that the definitions in the Act should be interpreted 'flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force [the Legislature] periodically to update the act'").

[13] *See Moneyweb (Pty) Limited v Media 24 Limited and Another* (31575/2013) [2016] ZAGPJHC 81; [2016] 3 All SA 193 (GJ); 2016 (4) SA 591 (GJ) para 113 (5 May 2016) (considering factors to determine whether a particular dealing is "fair" as including: the nature of the medium in which the work has been published; whether the original work has been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that has been taken; the

B. 12B(1)(a), Quotation

We conclude that Parliament could make explicit the "fair practice" standard within the quotation right in Section 12(B)(1)(a) to parallel the requirement in the current Act and in the Berne Convention for the Protection of Literary and Artistic Works.

The President lists the quotation right in Section 12(B)(1)(a) of the CAB among those he alleges may violate the Constitution, but he does not explain his reservations. The Berne Convention, which South Africa is a member of, requires that it "shall be permissible to make quotations from a work …, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose."[14] In the Parliamentary review process, it was suggested that the quotation right include the Berne Convention's standard that every quotation be "compatible with fair practice."[15]

The Berne Convention does not require that the "compatible with fair practice" condition be stated directly in the exception,[16] and many copyright laws provide quotation rights that do not explicitly require compliance with "fair practice."[17] Many

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extent of acknowledgement given to the original work); O H Dean, Handbook of South African Copyright Law (1987) 1-52 (opining that four factors in U.S. fair use right, which also appear in in the Australian fair dealing rights, "are commonsensical and reasonable and should be followed by the South African courts").

[14] Berne Convention for the Protection of Literary and Artistic Works, Art. 10.

[15] See Copyright Act of South Africa, Sec. 12 (3) states (emphasis added):

> "The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: *Provided that the quotation shall be compatible with fair practice*, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work."

[16] *See* Jonathan Band, *Analysis of Woods and Myburgh Comments on CAB*, Joint PIJIP/TLS Research Paper Series #55, 4 (2020) ("Contrary to Woods' suggestion, the Berne Convention does not require explicit inclusion of the concept "compatible with fair practice" in national legislation. Rather, the phrase serves as a standard by which to evaluate whether the exceptions for quotations and illustrations in teaching are being applied fairly, or are being applied so broadly that they swallow the author's exclusive rights.").

[17] See e.g. Copyright in Literary and Artistic Works (Sweden), Art. 22 (as amended up to Act (2018:1099) (permitting quotation "in accordance with proper usage and to the extent necessary for the purpose"); Intellectual Property Code (France), Art. L211 (amended by Act No. 2016-925 of July 7, 2016) (permitting "analyses and short quotes justified by the critical, polemical, educational, scientific or informative nature of the work in which they are incorporated"); Dominican Republic: Law No. 65-00 on Copyright, Art. 31 (August 21, 2000)(permitting quotation "provided that they are not of such length and continuity that they might reasonably be considered a simulated, substantial reproduction of the content of his work that causes injury to the author thereof"); Iran: Act for Protection of Authors, Composers and Artists Rights, Art. 7 (Copyright Law) (January 12, 1970), Translation and Reproduction of Books, Periodical and Phonograms Act (December 26, 1973)("provided that the sources of quotations are mentioned and the customary limitations are

of these laws, however, contain other qualitative terms that require analysis of the fairness of the purpose for which the quotation is used. It is possible that courts would read such a qualitative assessment of purpose into the statute and render it in compliance with international law. The existing quotation right in South Africa explicitly requires that quotation be compatible with fair practice. To resolve any ambiguity and to follow current law, we advise that the "fair practice" criteria be included in the quotation right.

C. 12B(1)(c) Broadcasting

We conclude that no amendment is needed for Section 12B(1)(c), authorizing certain uses of works by broadcasters.

The President lists the exceptions for broadcasters in Sec. 12B(1)(c) among those he alleges may violate the Constitution and international law, but he does not explain his reservations. The purpose of the provision is to authorise expressly incidental reproductions made by broadcasters to facilitate their services. The Section expressly prohibits any reproduction from being "used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work." The currently in force Copyright Act already provides this right; the amendments made by the CAB are merely semantic.[18] We see no reason to amend this provision.

D. 12B(1)(e)(i), News of the day

We propose removing Sec. 12(B)(1)(e)(i) from the Bill.

The President lists Section 12(B)(1)(e)(i) among those for which he expresses reservations. The Section permits the reproduction and communication to the public of articles and broadcasts "on current economic, political or religious topics" if exclusive rights in the work "is not expressly reserved." The provision exists in much the same form in the current Act,[19] and is common in other copyright laws.[20]

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observed"). Jordan: Law No. 22 of 1992, on Copyright and its Amendments, Art. 17 (2005)("for the purpose of clarification, explanation, discussing, criticizing, educating or testing in as much as justifiable by this objective, provided that the name of the product and its author are mentioned); Netherlands: Act of September 23, 1912, containing New Regulation for Copyright, § 15a (Copyright Act 1912, as amended up to September 1, 2017)("the quotation is in accordance with what is generally regarded as reasonably acceptable and the number and size of the quoted parts are justified by the purpose to be achieved").

[18] See Copyright Act of South Africa, Sec. 12(5)(b).

[19] See Copyright Act of South Africa, Sec. 12(7) ("The copyright in an article published in a newspaper or periodical, or in a broadcast, on any current economic, political or religious topic shall not be infringed by reproducing it in the press or broadcasting it, if such reproduction or broadcast has not been expressly reserved and the source is clearly mentioned.").

[20] See, e.g., African Intellectual Property Organization (OAPI), Agreement Revising the Bangui Agreement of March 2, 1977, Article 16 ("it shall be permitted, without the consent of the author and without payment of remuneration, but subject to the requirement of stating the source and the name

One commentator posited that permitting uses of works where copyright is "not expressly reserved" violates the Article 5(2) of the Berne Convention. That Article requires that the "enjoyment and the exercise" of copyright "shall not be subject to any formality." The notice requirement that copyright has been reserved, required for a work to not be subject to the exception in Sec. 12(B)(1)(e)(i), could be intercepted as the kind of "formality" prohibited by Article 5(2) of the Berne Convention. The Berne Convention may not apply here, however, because it expressly provides that its protections "shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."[21] The question is thus raised as to whether Sec. 12(B)(1)(e)(i) only provides a use right for "news of the day or … items of press information."

We conclude that this section of the law may be safely deleted to resolve any ambiguity as to its permissibility under international law. Any fair use of works for informatory purposes would be adequately dealt with under the general flexible exception in Section 12A. As long as that Section is maintained, Sec. 12(B)(1)(e)(i) may be deleted without harming the objectives of the Bill.

E. 12B(1)(f), Translations

We propose amending the translation exception in 12B(1)(f) to promote the Bill of Rights and reflect the full range of purposes for which a lawful translation may be made.

The President lists the exception for translations "for teaching" (as it is presently worded) in Sec. 12B(1)(f) among those he alleges may violate the Constitution and international law, but he does not explain his reservations. The right to translate works may be necessary to promote various Constitutional rights, such as the right of South Africans "to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable,"[22] the right of everyone "to use the language and to participate in the cultural life of their choice,"[23] and the right of linguistic communities not to be denied the right, "to enjoy their culture" and "use their language."[24] The current Act provides a right of translation that is not limited to "teaching."[25] The limitation of the

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of the author if such name is given in the source, (i) to reproduce in the press, to broadcast or to communicate to the public, an economic, political or religious article published in newspapers or periodicals, or a broadcast work of like nature, in those cases where the right of reproduction, broadcasting or communication to the public has not been expressly reserved").

[21] Berne Convention for the Protection of Literary and Artistic Works, Art. 2(8).

[22] Constitution of South Africa, sec. 29(2).

[23] Constitution of South Africa, sec. 30.

[24] Constitution of South Africa, sec. 31(1)(a).

[25] See Copyright Act of South Africa, sec. 12(11) ("(11) The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question

translation right to "teaching" is too narrow to realise the full scope of these rights protected by the Bill of Rights. We therefore recommend the expansion of the translation right to include any translation "for a non-commercial purpose," which is "consistent with fair practice," and which "does not exceed the extent justified by the purpose."

F. 12C Transient copies

We find no reason to amend the exception for transient copies in Section 12C.

The President lists the exception for uses of transient copies in technological processes authorized by Section 12C of the CAB among those he alleges may violate the Constitution and international law, but he does not explain his reservations. Exceptions for transient copies are necessary to facilitate many modern digital activities such as streaming video, reading a website, and sending and receiving email. The provision is substantially similar to the exception for transient copies in current EU law,[26] as well in the laws of many countries around the world.[27] It is widely accepted that exceptions for transient copies for technological processes are reasonable and comply with international law.[28]

G. 12D Education

We conclude that Section 12D is constitutional in its present form.

The President lists the exception for educational uses in 12D among those he alleges may violate the Constitution and international law, but he does not explain his reservations. Some commenters question section 12D(3), which allows educational institutions to copy an entire book into a course pack if "a licence to do so is not available from the copyright owner, collecting society or an indigenous community on reasonable terms and conditions." Section 12D(4) permits reproduction of "a whole textbook" solely for "educational or academic activities" if the "textbook is out of print," "the owner of the right cannot be found," or

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either in its original language or in a different language, and the right of translation of the author shall, in the latter event, be deemed not to have been infringed.").

[26] See EU Directive 2001/29/EC, Art. 5 (requiring exception for "[t]emporary acts of reproduction … which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance").

[27] See, e.g., Botswana Copyright Act, Art. 19(a) (providing exception for "temporary reproduction of a work … made in the process of a transmission of the work or an act of making a stored work perceptible").

[28] See Sam Ricketson, *WIPO Study On Limitations And Exceptions Of Copyright And Related Rights in the Digital Environment*, Standing Committee on Copyright and Related Rights (2003) p.79 (explaining that "no provision concerning temporary reproductions found its way into the text of the WCT", and "[a]ccordingly, it remains a matter for national legislators to determine whether, and to what extent, they will provide for exceptions for this kind of reproduction in their laws").

"authorised copies . . . cannot be obtained at a price reasonably related to that normally charged in the Republic." It is asserted by some commenters that the use of entire works without payment of equitable remuneration could unreasonably prejudice the legitimate interests of the authors.

In our considered view, section 12D is defensible as a legitimate policy choice made by the South African legislature that reconciles its international obligations in respect of copyright and human rights and gives effect to the Bill of Rights in line with its constitutional obligations. The core provision of Sections 12D(3) and (4) is to require that copyright holders of educational materials serve the South Afrcian market on reasonable terms and conditions. This power to control abuses of monopoly power is enshrined in international law, including in the Berne Convention and WTO TRIPS Agreement, which protect the right of countries to control abuses of intellectual property rights.[29] There are parallel concepts in South African patent and competition law, both of which define a failure to serve the market on reasonable terms as an abuse.[30] The provision reflects long standing practice in South Africa, where universities and other educators during Apartheid

[29] See Stockholm Revision Conference Report I ("263. The Committee accepted, without opposition, the proposal of its Chairman that mention should be made in this Report of the fact that questions of public policy should always be a matter for domestic legislation and that countries of the Union would therefore be able to take all necessary measures to restrict possible abuses of monopoly."); WIPO Guide to the Berne Convention for the Protection of Literary and Artistics Works (Paris Act, 1971) ("17.4. However, quite apart from these powers of censorship, it was unanimously agreed in Stockholm that questions of public policy should always be a matter for national legislation and that countries of the Union would therefore be able to take all necessary measures to restrict possible abuse of monopolies."); Sam Ricketson, *Study on Limitations And Exceptions of Copyright and Related Rights in the Digital Environment* (2003) ("Berne Union members are free to take all necessary measures to restrict possible abuses of monopoly, and this will not be in conflict with the Convention so long as this is the purpose of the measures, even if, in some instances, this means that the rights of authors are restricted. All private rights have to be exercised in accordance with the prescriptions of public law, and authors' rights are no exception to this general principle."); World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights, Art. 8(2) (clarifying that WTO Members may adopt measures "to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade").

[30] See South African Patents Act, Sec. 56(2)(c) ("The rights in a patent shall be deemed to be abused if—(c) the demand for the patented article in the Republic is not being met to an adequate extent and on reasonable terms"); Competition Act of South Africa, Section 8(a) (prohibiting dominant firm from charging "an excessive price to the detriment of consumers", defining "excessive price" as"a price for a good or service which- (aa) bears no reasonable relation to the economic value of that good or service; and (bb) is higher than the value referred to in subparagraph (aa)"); WTO TRIPS Agreement, Art. 8(2) ("Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."); Art. 40(2) ("Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.");

commonly reproduced for educational purposes articles and whole books that were not available in South Africa because of censorship or economic boycotts.[31] The provisions reflect the laws of many other countries that permit greater free uses of works that are not commercially available at reasonable prices.[32] The expansion of education rights in the Copyright Act was recommended by professional reviews of the law commissioned by the Department of Trade and Industry.[33]

Sections 12D(3) and (4) are quite narrow in their application. Each is subject to Section 12D(1), which clarifies that the only purpose for which a whole book can be copied is for non-commercial "educational and academic activities." Similarly, Section 12D(3) provides that educational institutions must by default *first* try to secure a licence from the copyright owner to incorporate whole works into course packs or any other form. *If and only if* such a licence is unobtainable on *reasonable terms* can they incorporate whole works.

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[31] See Eve Gray and Laura Czerniewicz, *Access to Learning Resources in Post-apartheid South Africa*, in Shadow Libraries, 112 (2018) (reviewing publishing practices before and after Apartheid).

[32] See Canada Copyright Act, Section 29.4 (providing that "[i]t is not an infringement of copyright for an educational institution … to reproduce a work, or do any other necessary act, in order to display it" if the work is not "commercially available" - defined as "available on the Canadian market within a reasonable time and for a reasonable price"); Indian Copyright Act, s 52(1)(o) (providing that "the making of not more than three copies of a book … for the use of the library if such book is not available for sale in India"); 17 U.S. Code § 108 (providing right of libraries to make replacement copies of an "entire work, or to a substantial part" if the work "cannot be obtained at a fair price"); Afghanistan, Law Supporting the Rights of Authors, Composers, Artists and Researchers (Copyright Law) (2008), Article 44 (permitting Minister to grant "a nonexclusive license to reproduce and publish" any work if "Copies of the work were not distributed in the state … for a price similar to the prices of similar works"); Albania, Law No. 35/2016 of March 31, 2016, on Copyright and Related Rights, Article 72 (providing right to make personal copy of a whole book if "its sold copies are exhausted for at least two years"); Australia Copyright Act, Section 40(2)(c) (including as a factor for determining a fair dealing for research or study "the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price"); Section. 49 (providing right of libraries and archives to make replacement copies of a whole work if "the work cannot be obtained within a reasonable time at an ordinary commercial price"); Cabo Verde, Copyright Act, Article 72 (permitting reproduction "of a single copy of works which are not yet available in trade or are impossible to obtain, for purely scientific or humanitarian interest purposes"); China, Regulation on the Protection of the Right to Network Dissemination of Information, Art. 7 (2006) (permitting libraries to make a digital replacement copy of a work "which is unavailable or only available at a price obviously higher than the marked one on the market"); Sudan, Copyright and Neighbouring Rights (Protection) and Literal and Artistic Works Act 2013, Art 31 (authorizing libraries and archives to make replacement copies of works if "the edition of the copy in their possession might be out of stock or is impossible to get in a reasonable price").

[33] See Genesis Analytics, *Assessment of the Regulatory Proposals on the Intellectual Property Policy Framework for South Africa*, p. 77-78 (31 July 2014) (advocating for expansion of educational exceptions in the law, including through a general fair use provision, allowances for the utilisation of whole works for teaching, extending exceptions to all types of education, and removing restrictions on the number of copies for educational purposes that can be made of a work).

H. 19B Reverse Engineering

We find no reason to amend the new exception in Section 19B for reverse engineering.

The President listed this exception in his criticisms, but no other commentator to our knowledge criticised this exception as being out of compliance with the Constitution or international law. Reverse engineering exceptions are widespread throughout the world.[34] Sec. 19B(2) closely follows the text of Article 6 of the European Union Software Directive (2009/24/EC) with minor textual changes. Sec. 19B(1) is almost exactly the same as Article 5(3) of the European Union Software Directive. Both exceptions are narrowly tailored to allow very specific actions necessary for the advancement of technology. Such exceptions are critical for enabling competition in the supply of parts of inputs to standard technology that needs to interoperate with other components.

I. 19C Library uses

We find no reason to amend the library rights in Section 19C.

These provisions appear substantially similar to a frequently-referenced international model law to meet the interests of libraries.[35] Some commenters question the provisions in 19C(4) and (9) that permit the making available of works in their collection through a "secure computer network," without the requirement contained in some laws that such network be accessed only from the premises of the library. These criticisms were made before the COVID-19 pandemic cut off physical access to libraries around the world. The CAB now appears prescient. Many libraries and educational institutions in the United States, Canada and Europe provide remote access to at least some works via secure computer networks. This right is necessary to promote the rights of all South Africans to information and to education during periods when physical facilities are closed or inaccessible. We find no reason to amend this Section.

V. International Law

The President's letter states that the President refers the Copyright Amendment Bill back to Parliament "so that it may consider the Bills against South Africa's International Law obligations". However section 79(1) of the Constitution permits

[34] See e.g. India, Art 52 (providing an exception for "the doing of any act necessary to obtain information essential for operating interoperability of an independently created computer programme with other programmes by a lawful possessor of a computer programme provided that such information is not otherwise readily available").

[35] *See* EIFL Draft Law on Copyright Including Model Exceptions and Limitations for Libraries and Their Users (2016).

referral back to Parliament only for constitutional issues. It is possible that in a limited number of highly specific cases a failure to comply with International Law has implications for the constitutionality of a legislative provision. However the President's letter does not explain why any of the reservations on the CAB's compliance with international law raises a constitutional issue, and cites several treaties to which South Africa is not a party.[36] We nevertheless examine each of the President's reservations and suggest possible amendments to respond to any legitimate concerns we identify.

A. Sec. 19D, Marrakesh Treaty

We propose that Parliament may add a reference to "authorised entities" in Section 19D to clarify the application of the cross-border provisions of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. We emphasise, however, that we do not conclude that this clarification is required by the Constitution or to implement the Marrakesh Treaty.

The President's letter asserts that the Bill may not be in compliance with the Marrakesh Treaty, without giving any detail.[37] It has been claimed by some commenters that the CAB does not adequately authorise cross border trade in accessible format copies of works, as intended by the Marrakesh Treaty. We disagree.

It is claimed that the Bill does not establish a mechanism for the cross border trade in accessible format copies of works by so-called "authorised entities" -- a term used in Article 5 of the Marrakesh Treaty. Article 5.1 of the Marrakesh Treaty requires that member countries "shall provide" that accessible format copies of works "may be distributed or made available by an authorised entity to a beneficiary person or an authorised entity in another Contracting Party" (emphasis added). Article 5.2 provides that parties "may" meet this obligation through a specific provision of law for authorised entities. But Article 5.3 makes clear that countries do not need such a provision: "A Contracting Party may fulfill Article 5(1) by providing other limitations or exceptions in its national copyright law".

Section 19D(3) of the CAB promotes cross-border trade of accessible formatted works, including through authorised entities:

> (3) A person with a disability or a person that serves persons with

[36] For further discussion of these points, *see* Samtani, Sanya, *The Domestic Effect of South Africa's Treaty Obligations: The Right to Education and the Copyright Amendment Bill* (2020). PIJIP/TLS Research Paper Series no. 61, at 31-39.

[37] South Africa is not currently a member of the Marrakesh Treaty. However, we recognise that one of Parliament's stated purposes for enacting the CAB is to put in place appropriate domestic legislation in order for South Africa to accede to the Marrakesh Treaty. In its current form, we believe that 19D is constitutionally required as the current Copyright Act does not contain any provisions at all to facilitate access to materials under copyright for persons with disabilities.

> disabilities may, without the authorisation of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person.

Section 19D(3) is adequate to implement the cross border provision of the Marrakesh Treaty. By authorising cross border trade by "a person that serves persons with disabilities," the section clearly authorises cross border trade by legal persons, including authorised entities.[38] If Parliament desires to make this fact more clear, it could add a definition of "authorised entity" and add the phrase "including an authorised entity" in Section 19D(3) after the words "a person that serves persons with disabilities." We emphasise, however, that these provisions are not required to implement the Marrakesh treaty.

B. Technological Protection Measures, WIPO Copyright Treaty

We find that no amendments to the Bill are needed for South Africa to accede to the WIPO Copyright Treaty (WCT), including in its definition of a technological protection measure. But, as with the Marrakesh Treaty, South Africa is not a party to the Treaty, so compliance with it cannot raise a constitutional concern. Rather, an intent of the Bill is to allow South Africa to accede to the WCT.

The President states that the WCT requires "legal remedies against the circumvention of technological measures used by authors to protect their works," implying that the Bill does not provide such protection. The Bill provides protections against circumventing technological protection measures, defined in Section 1(i)(a) as "any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation prevents or restricts infringement of copyright in a work." This definition is consistent with the WIPO Copyright Treaty Art. 11, which requires "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used … in connection with the exercise of their rights." There is no requirement in the WIPO Copyright Treaty to protect measures that control access to work for a non-infringing purpose. Accordingly, we find no amendment is needed in response to the President's objections.

[38] The term "person" in South African Law includes a legal person - i.e. an organization.

APPENDIX I: PROPOSED AMENDMENTS TO THE CAB

We offer the following proposed amendments to the Bill to better tailor its provisions to its purposes. As we describe above, we do not find that any of these amendments is constitutionally required.

VI. SECTION 6A, 7A, 8A

Option 1

Add the word "fair" before "share of royalty" throughout Sections 7A and 8A.

Option 2

To add further definition of the application of the concept of the fair royalty requirement, including to prospective uses under existing agreements, Parliament could add a definition of a "fair royalty." For example:

> Definitions
>
> 'Royalty' means a periodic payment based on a percentage or other share of the revenue or sales made from commercial exploitation of a work or performance.
>
> 'Fair royalty' means appropriate and proportionate remuneration based on the totality of the circumstances, including:
>
> > the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or performance;
> >
> > market practices, the actual exploitation of the work, and amount normally paid in the particular industry in South Africa and globally;
> >
> > amounts or ranges determined fair through collective bargaining or a determination by the Minister, if any.

It could also consider replacing the standard for application to works or performances assigned before the commencement date of the Copyright Amendment Act (i.e. sections 6A(7), 7A(7), 8A(5)) with language based on the so-called "bestseller" clause in current EU law, described above in footnote 5. For example:

> (xx) An author or performer is entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights or to whom the author or performer licensed or assigned his copyright, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the work or performance. Where parties cannot agree on fair remuneration in such a case, any party may refer the matter to the Tribunal for an order determining the fair remuneration.

VII. Section 12B(1)(a)

We offer the following amendment as an option to return the "consistent with fair practice" requirement to the quotation right.

(1) Copyright in a work shall not be infringed by any of the following acts:

(a) Any quotation: Provided that—

(i) **the quotation is compatible with fair practice**

(ii) the extent thereof shall not exceed the extent reasonably justified by the purpose; and

(iii) to the extent that it is practicable, the source and the name of the author, if it appears on or in the work, shall be mentioned in the quotation

VIII. Section 12B(1)(e), News of the Day

We offer the following amendment to remove the exception for uses of news unless the reproduction right is expressly reserved:

12B. (1) Copyright in a work shall not be infringed by any of the following acts: . . .

(e) subject to the obligation to indicate the source and the name of the author in so far as it is practicable—

(i) ~~the reproduction by the press, or in a broadcast, transmission or other communication to the public of an article published in a newspaper or periodical on current economic, political or religious topics, and of broadcast works of the same character in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved;~~

~~(ii)~~ the reporting of current events, or the reproduction and the broadcasting or communication to the public of excerpts of a work seen or heard in the course of those events, to the extent justified by the purpose; or

(ii~~i~~) the reproduction in a newspaper or periodical, or the broadcasting or communication to the public, of a lecture, address, or sermon or other work of a similar nature delivered in public, to the extent justified by the purpose of providing current information;

IX. Translation

We propose the following language be used to replace the current Section 12B(1)(f) to better reflect the full range of purposes for which a lawful translation may be made.

(f) the translation of such work into any language: Provided that such translation is done for a non-commercial purpose, is consistent with fair practice, and does not exceed the extent justified by the purpose.

X. Section 19D, Disability

We offer the following amendments to better tailor the CAB to the terms of the Marrakesh Treaty designed to enable cross-border exchanges of works.

Definitions

"authorised entity" means an entity that is authorised or recognised by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities or institutional obligations.

Amend Section 19D(3) to read:

(3) A person with a disability or a person that serves persons with disabilities, **including an authorised entity,** may, without the authorisation of the copyright owner export to or import from another country any legal copy of an accessible format copy of a work referred to in subsection (1), as long as such activity is undertaken on a non-profit basis by that person**, provided that prior to the distribution or making available the person did not know or have reasonable grounds to know that the accessible format copy would be used for other than for persons with disability.**